

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 03-27

December 4, 2002

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Revised Unfair Labor Practice Casehandling Manual

You will be receiving under separate cover several informal copies of the revised Unfair Labor Practice Casehandling Manual. Although the revised Manual has not been finalized, the informal copy is being released and should be used by the Regional Offices immediately. A copy is also being placed on the Agency's website (www.nlr.gov) as well as on the Agency's intranet under the "publications" button. The manual was revised by a field committee comprised of Richard Ahearn, Regional Director, Region 9; Mark Carissimi, Deputy Regional Attorney, Region 8; Michael Joyce, Assistant to the Regional Director, Region 6; and Rik Lineback, Regional Attorney, Region 25 and was coordinated by Nelson Levin, Assistant General Counsel, Division of Operations-Management. In addition, the committee sought and received valuable input from Field and Headquarters staff at all levels.

Attached is a document entitled Significant Highlights that will assist in using the new Manual by identifying the most significant revisions.¹ Some of the major changes to the Manual include expanded direction on investigations, settlement procedures, subpoena issues and clarification of the complex area of priority cases under Sections 8(b)(4) and 8(b)(7) of the Act. Also the revised Manual adds sections on the deferral of cases, remedial initiatives, the role of the settlement judge and contacts with parties by Board agents based on the American Bar Association's Model Rule 4.2.

If you have any questions with respect to this memorandum, please contact your Assistant General Counsel or Deputy.

/s/
R.A.S.

Enclosures

cc: NLRBU

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¹ Reference is made in the attached Significant Highlights to a revised Form 4701, Notice of Appearance, and a new Form 4702, Annual Notice for Receipt of Charges, Petitions and Case Dispositions. These forms will be issuing shortly under separate cover.

SIGNIFICANT HIGHLIGHTS

PRE-INVESTIGATION²

Sections 10010-10030 Initiation of Cases

The changes in these sections consist primarily of updating the Manual to be consistent with current procedures and the use of new technologies.

The Manual revisions:

1. Note that pre-filing assistance includes identification of the basic theory of the case and the appropriate sections of the Act involved. (10012.2)
2. Add references to the Agency website for information (10012.4) and to CATS and its role in the maintenance of I.O. records. (10012.5)
3. Add reference and instructions concerning the filing of charges by facsimile. (10018.1)
4. Describe situations in which the Board must be notified of the filing of a charge. (10012.5)
5. Modify instructions concerning communications with parties to follow guidelines related to “skip counsel” issues. (10028)

Section 10040 Initial Notice to Parties Upon Filing of Charge

This revision deletes reference to Form 4813, Designation of Representative which has been abolished because Agency policy set forth in 10058 was revised to conform with Model Rule 4.2. The revised policy dictates specific procedures for communicating and corresponding with represented parties, thereby making Form 4813 superfluous. (10040.1, .5 and .6)

INVESTIGATION

Sections 10050-10070 Investigation

The revisions more clearly define the responsibilities of the parties and the Board agent and are more affirmative in approach while retaining the existing cautionary guidelines.

² In order to facilitate review of these Highlights, after most comments, the section number of the revised Manual is listed, followed, where necessary, by the relevant section number of the current Manual.

The Manual revisions:

1. Are more instructional and more clearly define the role of the Board agent and, in particular, encourage agents to fully develop and discuss theories of cases with charging parties. (10050) (Currently 10050, 10054 & 10056.1)
2. Delete current sec. 10051, Time Goals for Processing Cases, which is now addressed in a new section on Impact Analysis. (11740) (Currently 10051)
3. Encourage prompt telephone contact with charging parties in order to develop sufficient understanding of the case and to schedule early appointments. (10052.3) (Currently 10056.1)
4. Add a new section in order to discuss the use of questionnaires in investigations. (10052.4)
5. Emphasize early contact with charged party, even before the charging party interview is conducted. The revisions note that information obtained through such contact may be helpful in confronting the charging party with charged party's defense. They also note that such early contact may be helpful in achieving a prompt settlement or adjustment. (10052.5) (Currently 10056.5)
6. Add a new section which provides for the development of a strategy for the investigation and sets forth the elements of such. (10052.6)
7. Add a new section which emphasizes the Board agent's responsibility to identify and develop issues but also notes the need to remain neutral. (10052.7)
8. Address early consideration of Section 10(j) relief and make reference to a more comprehensive treatment of Section 10(j) at sec. 10310. (10052.9)
9. Note the preference for face-to-face affidavits in Category II and III cases, but permit telephone affidavits in certain Category I cases. The revisions also set forth, in somewhat greater detail, suggested order to follow in structuring affidavits and encourage Board agents to probe testimony of witnesses and obtain all relevant documentary evidence. (10054.2(a)) (Currently 10056.2)
10. Specifically note that in certain circumstances, an unannounced personal visit by a Board agent may be effective in achieving cooperation from third-party witnesses and suggests consideration of investigative subpoenas to obtain information. The revisions delete the restriction at sec. 10056.4 of the current Manual that depositions may not be used in connection with precomplaint investigations. (10054.3) (Currently 10056.4 & 10056.7)

11. Add specific suggestions for dealing with lack of cooperation by the charged party, including issuance of investigative subpoenas per GC-00-02. (10054.5) (Currently 10056.5)
12. Add the General Counsel's current policy with respect to limitations contained in statements of position. (10054.6)
13. Add a new section to specifically address a new Form 4702, Annual Notice for Receipt of Charges, Petitions and Case Dispositions and revised Form 4701, Notice of Appearance. (10058.1)
14. Make comprehensive changes regarding the obligations of Regions in dealing with attorneys and non-attorney representatives in consideration of ABA Model Rule 4.2 ("skip counsel" concerns). Thus, sec. 10058 should be carefully reviewed.
15. Update procedures to be followed regarding misconduct of attorneys and representatives, and specifically note new Rule at Sec. 102.117. (10058.5 and 10058.6) (Currently 10054.6)
16. Make no substantive change regarding affidavits other than including the specific confidentiality paragraph for affidavits (10060.5) and noting the current GC policy on the use of telephone affidavits and the related procedures (10060.10). (10060) (Currently 10059)
17. Provide more specific guidance to Regions regarding the use of objective evidence to assist in resolution of credibility disputes. (10064) (Currently 10060)
18. Add new section titled Conclusion, Report, Decision and Implementation to replace Regional Decision section to reflect current practice. (10068) (Currently 10100 - 10116)

Sections 10118-10123 Deferrals, Withdrawals, Dismissals and Appeals

The revisions retitle this portion of the Manual from Informal Dispositions to be more descriptive. The revisions also specifically insert a section on Deferrals (10118), a topic not covered in the current Manual.

The Manual revisions create new sections which explain additional withdrawal circumstances:

- Oral Withdrawal Requests (10120.3)
- Adjusted Withdrawals (10120.4)
- Conditional Withdrawals (10120.5)

SETTLEMENTS

Sections 10124-10142 Settlements

Although the revisions follow the basic format of the current Manual, the content was updated and the language was modified for clarity. New sections were added on *Beck* remedies and GC remedial initiatives and the discussion on settlement techniques was expanded.

The Manual revisions:

1. Encourage the parties to resolve collateral disputes not directly involving the unfair labor practice charge when such will assist in resolving matters before the Agency. (10124.3)
2. Encourage Regions to solicit settlement meetings with the charged party even though experience with a particular charged party or its counsel may suggest that settlement is unlikely. (10128.5)
3. Add a new section on contacts with charging party on settlement issues and status. (10128.7)
4. Add a new section on *Beck* remedies. (10130.11)
5. Eliminate reference to settlement agreement and notice forms to members since notices to employees and members forms are more comprehensive and preferred. (10132.2)

Sections 10146-10154 Informal Settlement Agreements

This section was reorganized to proceed in a more chronological manner through the various steps of obtaining and effectuating an informal settlement agreement. In addition, new sections were added regarding the "scope of agreement" clause, settlements in 10(j) and 10(l) cases and the role of settlement judges.

The Manual revisions:

1. Modify the provisions regarding withdrawal of charges and approval of settlements to state that the Regional Director has the authority to approve withdrawal requests and settlements after the opening of the hearing and until evidence is introduced. Once evidence is introduced the administrative law judge must approve withdrawal requests and settlements. (10146.1, 10154.4 and .5, 10275.3)
2. Add a reference to settlement agreement Form 5378, approved by an ALJ. This provision also notes that any changes to the standard language on the form should

be clearly identified in an attachment, since the public has a right to rely on the standard language of the preprinted form. Consequently, any changes to the form should be clearly delineated. (10146.2)

3. Add a new section regarding the standard scope of the agreement clause (10146.3) and the special provisions required in 10(j) and 10(l) settlements. (10146.4)

Sections 10164-10170 Formal Settlements

The Manual revisions:

1. Note the Regional Director's delegated authority to approve a formal settlement agreement on behalf of the General Counsel and to submit it directly to the Board for approval. The revision further notes that unilateral settlements must be submitted to Advice for approval before submission to the Board. (10164.7)
2. Modify the transmittal of the formal settlement section to reflect that in a bilateral formal settlement an original and three copies of the transmittal memo, the stipulation and the record should be submitted to the Executive Secretary's office, and that in unilateral formal settlements, the same number of copies should be submitted to Advice. In addition, the settlement stipulation should be transmitted to the appropriate division electronically. (10164.8)
3. Modify the provision regarding the content of a formal settlement to reflect that the reservation of evidence clause should be included. (10166.2)
4. Add a section regarding a pattern for settlement stipulations in CB, CC, CD and CE cases. (10168)

STATUTORY PRIORITY CASES

Sections 10200-10248 Statutory Priority Cases

The revisions attempt to eliminate repetition and improve the organization of the material. They change the chapter heading to clarify that this chapter deals only with priority cases under 8(b)(4), 8(b)(7) and 8(e) and, not 10(j). Section 10(j) is separately addressed in secs. 10310-10312. Directives regarding casehandling time frames and requirements regarding submission to, or authorization from, headquarters have been updated to reflect current practice.

Sections 10206-10220 CD Cases

The Manual revisions:

1. Add a format for 10(k) hearing officer report. (10214.7).
2. Emphasize that the Board has no power to resolve disputes under 10(k) if an agreed-upon method of adjustment exists. Thus, even if parties have not invoked

that method, no 10(k) hearing may be held. (10216-10216.2) Dismissal of the 8(b)(4)(D) charge is not necessarily warranted, however; and, if the dispute continues, complaint may issue. (10216.1(d))

3. Clarify the current directive that the Region should dismiss, absent withdrawal, upon a showing that the dispute has actually been adjusted (current sec. 10212.5(b)) to require that, when the Region is informed that the dispute has been adjusted, it should also investigate whether the charged party is complying with the resolution. (10216.2)

Sections 10222-10226 CE Cases

As to the circumstances in which a settlement may be approved where only one party to the contract is a charged party, the revisions add that a settlement agreement may be submitted to an ALJ for approval where the non-charged party, having received proper notice, fails to appear and object. (10224.2)

Sections 10230-10236 CP Cases

The Manual revisions clarify the statutory scheme of 8(b)(7), its relationship to representation proceedings, and, in particular, to the expedited election procedures created by 8(b)(7)(C). Included are references to the provisions of the Board's Rules and Regulations dealing with expedited elections under Section 8(b)(7)(C), where applicable. (10232)

FORMAL PROCEEDINGS

Sections 10260-10280 The Complaint

The Manual revisions:

1. Emphasize the need to insure that the charge is sufficiently broad to support all allegations of the complaint and sufficiently detailed to include all discrete categories of unfair labor practices. (10264.1)
2. Substitute the actual date answer is due for previous explanation which required respondent to compute. (10268)
3. Delete reference in the current Manual to the procedures for withdrawing complaint dictated by *Leeds & Northrup* because the premise of that case was rejected by the U.S. Supreme Court in *NLRB v. Food Workers Local 23*, 126 LRRM 3281 (1987). The revision therefore, relies on a recent Board case, *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992), for the propositions that:
 - Prior to introduction of any evidence at hearing on the issue, the General Counsel has unreviewable authority to withdraw a complaint allegation.

- After introduction of evidence, in order to withdraw all or part of a complaint, the General Counsel must move the ALJ for permission. (10275.2)

Sections 10284-10288 Submission by Stipulation

The Manual revisions delete the prior reference to a policy of encouraging stipulated records, since they are generally disfavored.

Sections 10310-10314 Injunctive Relief Under Section 10(j)

The Manual revisions:

1. Emphasize that the Region should promptly notify the parties during the investigation as soon as the Region concludes that interim relief may be warranted and invite them to submit relevant evidence and arguments. (10310.1)
2. Substitute reference to the guidelines in the 10(j) Manual for the specific guidelines in the current Manual. (10310.2)

Sections 10330-10340 Trial Preparation

The Manual revisions recommend, where circumstances allow, that subpoenas be served at least 2 weeks prior to trial to provide sufficient time to arrange for production of the witness or documents and for ruling on a petition to revoke prior to hearing. (10340)

Section 10351 Settlement Judge

The Manual revisions create a new section to address the role and functions of Settlement Judges provided for in 102.35(b) Rules and Regulations. This section incorporates the instructions set forth in OM 95-12.

Section 10352 Depositions in Lieu of Trial Testimony

The Manual revisions reflect actual practice in these proceedings by providing that Counsel for the General Counsel will participate fully in the deposition and is normally the officer before whom the witness will testify. (10352.4)

Sections 10380-10412 The Hearing

The Manual revisions:

1. Modify sections on Presentation of Evidence, in some parts substantially, to reflect the Agency's trial advocacy training manual and current practice. (10390-10403)

2. Retitle and restructure sec. 10408 to include a discussion of bench decisions in addition to the discussion of oral arguments as set forth in 102.35(a) and 102.42(a)(10) R & R and in OM 95-12. (10408)

COMMON TO ALL CASES

Sections 11700-11711 Jurisdiction

The Manual revisions add a new section to set forth existing procedures relative to disputed claims of NMB jurisdiction. (11711)

Sections 11730-11734 Concurrent R and C Cases

These sections are from the R case Manual.

Section 11740 Priority of Cases – Impact Analysis

The Manual revisions set forth the General Counsel's Impact Analysis policy.

Sections 11750-11754 Submission to Advice, Operations and Special Litigation

The various clearance requirements regarding C cases have been revised to correspond with the realignment of responsibilities between Advice and Operations set forth in GC 00-03. The references regarding clearance in R cases as they appear in the R Case Manual have been revised only to the extent necessary to avoid direct conflicts with the proposed revisions in the C Case Manual.

The Manual revisions modify the provision in the current Manual that remanded Advice cases are to be returned in 7 days, absent factors precluding such a prompt resubmission to a standard that requires all Advice remands to receive priority treatment consistent with their category under Impact Analysis. The revisions note that Advice should be informed of any delay and be given an estimate of the additional time required. (11750.3)

Sections 11770-11808 Subpoenas

The Manual revisions include the General Counsel's grant of increased discretion to Regional Directors concerning the use of investigative subpoenas set forth in GC Memos 00-02 and 94-9. (See secs. 11770 and 11770.2.) The revisions also note the clearance, reporting and assistance procedures with respect to investigative and trial subpoenas set forth in GC Memos 00-02 and 00-03 inclusive of issues specifically involving compliance and contempt. (See e.g. secs. 11770.4-.6, 11772, 11784 and 11790-.5.) Finally, the revisions include an expanded discussion of subpoena enforcement issues including a revised and restructured presentation.

Sections 11820-11828 Disclosure of Agency Documents and Subpoena of, and Testimony by, Agency Personnel

The Manual revisions:

1. Add a statement of the GC's policy on the disclosure of Board documents and testimony of Board personnel based upon GC Memo 94-14. (11820)
2. Add specific direction on the delegation of GC's Section 102.118 authority. (11824.1)
3. Distinguish between procedures to be followed in Board versus non-Board proceedings. (11826.3 and 11826.4)

Sections 11840-11846 Service, Filing and Communications with Parties

The Manual revisions restructure this portion of the current Manual by adding new section headings and discussing distinct service, filing and communications matters applicable to Regions and parties in general. The revisions insert specific references to the Rules and Regulations throughout and add a new section on Filing and Service by Parties (11846) to assist in setting forth the Board's rule changes (see particularly 102.114(f) and (g) Rules and Regulations) regarding the use of facsimile transmissions. The revisions also incorporate instructions set forth in OM 95-92 regarding service of charges and use of certified mail and return receipts (see 11842 Service by the Region). Finally, the revisions are consistent with the Agency's policy regarding communications with attorneys and representatives as set forth in sec. 10058.